

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES DEAN, JR., et al.,	}	
Plaintiffs,		Docket No. 09 C 1190
vs.		
CITY OF CHICAGO, et al.,		Chicago, Illinois
Defendants.		August 15, 2012
		4:00 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY

APPEARANCES:

For the Plaintiff: SRAGA HAUSER, LLC
BY: MS. JANE E. LI
MR. CHRISTOPHER L. PETRARCA
19730 Governors Highway
Suite 10
Flossmoor, Illinois 60422

HAMILTON LAW OFFICE
BY: MS. TORRI L. HAMILTON
11 South LaSalle Street
Suite 1000
Chicago, Illinois 60603

ERICKSON & OPPENHEIMER, LTD.
BY: MR. JON F. ERICKSON
118 South Clinton Street
Suite 200
Chicago, Illinois 60661

1 For the Defendant: DYKEMA, GOSSETT, ROOKS, PITTS, PLLC
2 BY: MR. DANIEL M. NOLAND
3 10 South Wacker Drive
4 Suite 2300
5 Chicago, Illinois 60606

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QUERREY & HARROW, LTD.
BY: MR. LAWRENCE S. KOWALCZYK
MS. STACEY M. ATKINS
MS. GHAZAL SHARIFI
175 West Jackson Boulevard
Suite 1600
Chicago, Illinois 60604

LAURA M. BRENNAN - Official Court Reporter
219 South Dearborn Street - Room 2102
Chicago, Illinois 60604
(312) 435-5785

1 (The following proceedings were had in open court:)

2 THE CLERK: 09 C 1990, Dean v. City.

3 MS. HAMILTON: Good morning, your Honor; Torri
4 Hamilton on behalf of plaintiff.

5 MR. PETRARCA: Good morning, your Honor; Chris
6 Petrarca, also on behalf of Mr. Dean.

7 MS. HAMILTON: Good afternoon.

8 MR. ERICKSON: Good afternoon; Jon Erickson
9 on behalf of plaintiff.

10 MS. LI: Good afternoon, your Honor; Jane Li on
11 behalf of plaintiff.

12 MR. KOWALCZYK: Good afternoon, your Honor; Larry
13 Kowalczyk on behalf of Officer Fiorito, here with Stacey
14 Atkins and Ghazal Sharifi from our office.

15 MR. NOLAND: Good afternoon, your Honor; Dan Noland
16 for the City.

17 THE COURT: I'm sorry. I didn't catch the other
18 person's name. You're Stacey Atkins.

19 MS. ATKINS: I am.

20 THE COURT: I didn't catch your name.

21 MS. SHARIFI: Ghazal Sharifi, your Honor.

22 THE COURT: Okay. You should spell that.

23 MS. SHARIFI: Sure. The last name is S, as in Sam,
24 h-a-r-i-f, as in Frank, i. First name is Ghazal, G-h-a-z, as
25 in zebra, a-l.

1 THE COURT: All right. So why don't we deal with Mr.
2 Noland's issue first.

3 So if I'm understanding this correctly, and you'll
4 correct me if I'm wrong, I may be doing this a bit too much
5 forest and not enough trees. The City's position -- Mr.
6 Noland being the lawyer for the City -- the City's position is
7 that the Moneill claim has been severed for trial. The other
8 claim against the City is an indemnification claim under 745
9 ILCS 10/9102, and there is no real good reason to have that
10 being part of the trial.

11 MR. NOLAND: That's our position. There is, I think,
12 a vicarious liability assertion.

13 THE COURT: On the state law claim.

14 MR. NOLAND: Yes.

15 THE COURT: Yes, okay. And the plaintiffs' position
16 is we're not dropping the indemnification claim or the
17 respondeat claim.

18 MS. HAMILTON: Correct, Judge.

19 THE COURT: So you tell me what the authority is for
20 me to tell them they have to drop it.

21 MR. NOLAND: Judge, we have been involved in three
22 cases where the stipulation has been accepted. One case was
23 Jimenez before your Honor.

24 THE COURT: That was a whole different story. I
25 mean, it really was. It was a whole different story, and it

1 was -- I mean, the plaintiff agreed to it in that situation.

2 MR. NOLAND: Yes.

3 THE COURT: Yes.

4 MR. NOLAND: The other two we were involved in were
5 Evans and Thompsen which were similar situations to Jimenez.

6 And ultimately there is no direct claim against the
7 City. The jury is not going to be deciding anything against
8 the City. It is -- as a result, the City would only be in
9 there as a potential deep pocket.

10 By operation of stipulation, depending on the
11 verdict, there will be a judgment entered by your Honor either
12 for or against the City. By operation of law, under the
13 indemnity statute as well as the vicarious liability
14 principles, there is going to be the judgment entered against
15 the City. We're not saying we're dismissed from the case.
16 The City will be -- either way there's going to be a judgment
17 either for or against based on what the jury finds as to
18 Officer Fiorito. So, therefore, the only --

19 There is no issue for the jury to decide as to the
20 City. We're just an entity there. Officer Fiorito is there.
21 The jury will know that he was a Chicago police officer. We
22 think that there being no issue for the jury to decide against
23 the City, that the City should not be on the verdict form or
24 mentioned at trial. The plaintiffs previously didn't quarrel
25 with this proposition.

1 THE COURT: When you say they didn't quarrel with it,
2 what exactly do you mean by that?

3 MR. NOLAND: Well, in addition to accepting the
4 stipulation or the bifurcation, just a couple weeks ago when I
5 initially made this point to the plaintiffs' counsel, they
6 simply said, thanks for your response.

7 THE COURT: Well, it doesn't mean they didn't object.
8 I mean, it just means they -- it sounds kind of like what we
9 were told was I hear what you're saying.

10 MR. NOLAND: I would have expected at that time they
11 would have said, you know, Dan, we disagree with you. We
12 expect you're going to be sitting at counsel table or the City
13 is going to be involved.

14 So just fundamentally, Judge, there is no claim, I
15 think, perhaps under Rule 403.

16 THE COURT: To be clear about that, there's a claim.
17 You have stipulated to liability on it, but there is a claim.

18 MR. NOLAND: You're right.

19 THE COURT: In fact, there's two.

20 MR. NOLAND: True enough. There is nothing for the
21 jury to decide against the City I think is the point I'm
22 trying to make.

23 THE COURT: Okay. What would you like to tell me
24 about this?

25 MS. HAMILTON: Just, Judge, that the City is, in

1 fact, the defendant, and there are Illinois pattern jury
2 instructions that instruct the jury as to the state law claim
3 about principal and agency, and we have submitted a form of
4 that instruction that your Honor had given in a previous case
5 that I tried before your Honor, and I just don't feel that
6 there's -- I don't see the reason why we would keep that
7 hidden from the jury. There is just no legal authority to
8 keep the fact that the City is a defendant, which they are,
9 from the jury.

10 THE COURT: Yes. I mean, frankly, I'm not prepared
11 to accept the proposition that there's either a legal basis
12 or, even if there is a legal basis, a good reason to force
13 somebody to accept a stipulation.

14 So it would kind of be like -- you know, when we were
15 talking about to some extent state law claims, it would be
16 kind of like if you have an auto accident claim against a
17 truck driver who is driving a truck for a company and the
18 company comes in -- and you sue, as you always do, the truck
19 driver and the company, or as you almost always do, the truck
20 driver and the company. And the company comes in and says, we
21 stipulate and, therefore, you should drop us from the case,
22 Judge. I mean, I just -- I think that is not the predominant
23 practice, and I'm not going to force it on somebody against
24 their will. So there's your answer.

25 So I want to start off with the defense motions in

1 limine.

2 And, by the way, as I was going back through the
3 opinion, there were a handful of typo type things that I'm
4 probably going to fix in a day or two which I missed the first
5 time around, the opinion on summary judgment, in other words.

6 So on the defense motions in limine, I think the --

7 MS. HAMILTON: Do you want us at the table or do you
8 want us up here?

9 THE COURT: Well, if somebody is going to be talking,
10 I want you up here, but you don't all have to be standing up
11 here all the time. That's my answer.

12 MS. HAMILTON: All right.

13 THE COURT: Okay. So the first defense motion in
14 limine is to bar a reference to mental incapacity or illness.
15 And the plaintiffs' response to that is they're not going to
16 offer any testimony, and they don't have a problem with
17 precluding any mention of any diagnosis of a mental illness or
18 disability but do object to Mr. Dean being barred from
19 testifying about the state of his mental health and whatever
20 symptoms he claims to have.

21 So tell me the position on that on the defense side.
22 That would be you.

23 MS. ATKINS: Yes, your Honor, I was just getting my
24 stuff in order. I apologize.

25 On the defense end, we would --

1 THE COURT: In other words, he's not going to be able
2 to get up on the stand and say, I have PTSD.

3 MS. ATKINS: Exactly.

4 THE COURT: Or that I've been diagnosed that I have
5 PTSD, but the plaintiffs want to be able -- the plaintiffs'
6 lawyers want to be able to say, you know, what are your
7 symptoms. I have sleepless nights, I'm depressed, I'm that
8 kind of thing.

9 MS. ATKINS: Your Honor, of course we have -- we have
10 no problem with him discussing on the stand that he has
11 sleepless nights and stomach aches, et cetera, but he did
12 testify in his deposition, I need not be diagnosed with PTSD
13 to have it. And he proffered his own opinion that he had
14 PTSD.

15 And then also our concern arose from the plaintiffs'
16 offered venire questions number 1 and 2 that talked about --

17 THE COURT: I will deal with that later.

18 MS. ATKINS: Okay. But we have no problem with him
19 talking about his experiences, what he's experiencing, but we
20 certainly don't want to allow him to be to able self-diagnose
21 in the absence of any medical practitioner.

22 THE COURT: So it sounds like both sides, at least
23 the people who are here in the room right now, which does not
24 include Mr. Dean, are all on the same page on this one. Does
25 that sound right?

1 MS. HAMILTON: Yes, Judge.

2 THE COURT: So here's the deal. And, you know, it
3 doesn't matter that Mr. Dean is not here, of course, but that
4 just makes it doubly incumbent on the plaintiffs' attorneys to
5 carefully instruct him regarding what is in bounds and what is
6 out of bounds either on this topic or on any other topics I
7 have to deal with.

8 And please include in your discussion that what is
9 going to happen if he goes out of bounds is that objections
10 are going to get sustained, testimony is going to get
11 stricken, he's going to be instructed in the presence of the
12 jury to confine his testimony to the rules as I've set them,
13 as they exist under the law. And the progressive discipline,
14 if you will, goes up from there.

15 So you will do that, right?

16 MS. HAMILTON: Absolutely, Judge.

17 THE COURT: So I think that what's been discussed --
18 so motion in limine number 1 is granted in part, denied in
19 part. No testimony about diagnosis. It's okay for him to
20 testify about symptoms.

21 Item number two, this has to do with other lawsuits,
22 incidents, et cetera, regarding Mr. Fiorito. And so I want to
23 get a handle -- because I don't think I really got it at least
24 as well as I need it from the response. What exactly is it
25 that the plaintiff proposes to offer relating to other

1 incidents regarding Mr. Fiorito?

2 MS. HAMILTON: Okay, Judge, there are several, the
3 first being --

4 The first that comes to mind for me would be the
5 sustained CR for putting false information in police reports.
6 That I think comes in under 608(b). We think it's fair game
7 for us to ask him about it. It was a CR investigation that
8 was conducted.

9 THE COURT: Okay. I'm just looking for the laundry
10 list at this point.

11 MS. HAMILTON: Then we have some 404(b) witnesses
12 that we have put on our witness list that the defendants have
13 objected to that I'm sure that we're going to have to go
14 through. So under -- so there's those witnesses and their
15 testimony about Officer Fiorito's arrest of them.

16 And then further, we do intend to ask the state's
17 attorney -- one of the state's attorney -- former state's
18 attorney witnesses that we have on our witness list about the
19 134 cases that were dismissed -- not about each case, but the
20 fact that there was 134 DUI cases brought and put into the
21 system by Officer Fiorito that were then dismissed. And it is
22 our position, and I can give you the argument on why we think
23 it's admissible under 404(b), if you're ready for that now,
24 but that's the list.

25 THE COURT: Okay. So let's talk about that last

1 thing first. Give me the theory as to its admissibility.

2 MS. HAMILTON: Yes, okay.

3 So, Judge, we believe that -- so this evidence, the
4 404(b) evidence, we're seeking to introduce doesn't have to do
5 with Officer Fiorito's character. It has to do -- it has been
6 the plaintiffs' position from the beginning on this case and
7 from the original complaint that's ever been filed that
8 Officer Fiorito had a scheme, a common pattern, of the way
9 that he behaved, and the motive of which, which is another
10 reason why we would bring this in to show motive, was greed.

11 He became a police officer at age 50. He only had
12 either 12 or 13 years to accumulate a pension or to save
13 enough money in order to retire. And during that time, he
14 made -- for several years he was engaging in this pattern of
15 false DUI arrests, arresting people when he did not have
16 probable cause to arrest them for DUI in order to both -- for
17 motive for both greed, and also we believe his hatred of
18 minorities, people that had a sexual preference that was
19 different than his own.

20 So we think that there's a couple of different, both
21 motive and common scheme and design.

22 THE COURT: So how does the dismissal of the
23 134 cases, or whatever it was, relate to that?

24 MS. HAMILTON: I think that it tends to show that he
25 did not -- that he had multiple arrests, multiple cases that

1 he put in, that were dismissed because the state's attorney
2 wasn't going to proceed on them. I think it tends to show --
3 all this tends to show lack of probable cause.

4 So what we have to prove is we have to show that he
5 did not have probable cause to arrest and he did not have
6 probable cause to prosecute or to cause Mr. Dean to be
7 prosecuted. If he was engaged in this common plan based on
8 his motives of greed and his hatred towards black people,
9 Hispanic people and gay people, then that tends to show that
10 he didn't have probable cause, that he was --

11 So it goes towards the probable cause analysis.
12 That's our belief. It's not being shown as improper character
13 evidence against Officer Fiorito.

14 THE COURT: Okay, I understand your reasoning on that
15 one.

16 So on item number one, which was the sustained CR,
17 give me a little bit more detail about your take on what the
18 sustained CR involved.

19 MS. HAMILTON: The sustained CR involved a Sergeant
20 Hitaris who responded to the scene where --

21 THE COURT: A sergeant named Harris, you said?

22 MS. HAMILTON: Hitaris.

23 THE COURT: Hitaris, okay.

24 MS. HAMILTON: Hitaris, who responded to the scene of
25 a DUI arrest that Officer Fiorito was making, had some

1 observations about the arrest, and then took a couple of days
2 off work, and when he returned and he reviewed the arrest
3 report that Officer Fiorito had created as a result of that
4 DUI arrest, he found things in the report that were false.
5 And he initiated a CR based on that, which was ultimately
6 sustained by the police department.

7 THE COURT: I know the police department has various
8 ways of characterizing things. What was the charge that was
9 sustained?

10 MS. HAMILTON: I would have to get that for you, but
11 I believe it was false information in a police report.

12 (Brief interruption.)

13 THE COURT: In terms of item number two, which was
14 what you referred to as the 404(b) witnesses, how many other
15 incidents are we talking about?

16 MS. HAMILTON: Three, one of them being Mr. Lopez.

17 THE COURT: Lopez, and what are the other two?

18 MS. HAMILTON: Bonnie Klein, and Kevin Pipkens.

19 THE COURT: Pickens?

20 MS. HAMILTON: P-i-p-k-e-n-s.

21 THE COURT: Pipkens, okay.

22 MS. HAMILTON: Yes.

23 THE COURT: And give me the thumbnail sketch version
24 of Lopez, Klein and Pipkens.

25 MS. HAMILTON: Of Lopez?

1 THE COURT: Of what happened in each one of those
2 situations, at least as you believe the evidence would play
3 out.

4 MS. HAMILTON: Yes. Well, the similarities between
5 them, they're all DUI arrests. They're all -- the reports, if
6 you look at all the reports, you know, strikingly similar
7 allegations by Officer Fiorito.

8 THE COURT: When you say "strikingly similar," what
9 is strikingly similar?

10 MS. HAMILTON: They have to escorted because they're
11 falling down. They fall out of their car. They have to --
12 they can't -- they have to lean back in their car to avoid
13 falling down, said that about Pipkens, said the same exact
14 thing about Steven Lopez in his deposition.

15 THE COURT: And does the report on Mr. Dean say
16 something similar to that?

17 MS. HAMILTON: Mr. Dean says -- or he says about
18 Mr. Dean that he had to be escorted because he tripped walking
19 up the stairs into the interview area.

20 They all talk about how -- all the reports talk about
21 how the individual arrestees were all insulting, and all the
22 arrestees all say that Officer Fiorito was actually the one
23 that was swearing at them and using -- Bonnie Klein says he
24 called her a dyke.

25 James Dean says that he asked him, I think you

1 already know -- he referred to him with the term "nigger," and
2 he told Steven Lopez to "shut the fuck up." Excuse my
3 language. And he used derogatory terms about Mr. Pipkens'
4 sexual preferences to Mr. Pipkens.

5 So we think that there's enough similarity between
6 all of them. They're all close in time, within a couple of
7 years at the outset, of Mr. Dean's arrest.

8 THE COURT: Okay. Ms. Atkins.

9 MS. ATKINS: Where would you like me begin, your
10 Honor?

11 THE COURT: I think go through them in the same
12 sequence that I talked about them with Ms. Hamilton.

13 MS. ATKINS: So beginning with the 144 cases that
14 were dismissed, your Honor, counsel says that this is going to
15 show something toward a conspiracy on the part of Officer
16 Fiorito, this grand scheme that he had.

17 Your Honor, there are only two counts in this case
18 against Mr. Fiorito. There isn't a claim for conspiracy. As
19 to any allegations as to a sexual orientation animus motive on
20 the part of Officer Fiorito, Mr. Dean himself in his
21 deposition said that that was never a claim.

22 THE COURT: So I've got to disabuse you of that. I
23 mean, I guess I hear pretty frequently in employment
24 discrimination cases that, well, the plaintiff said in his
25 deposition, I can't say that this person is a racist.

1 Evidence doesn't all have to come from the plaintiff.

2 MS. ATKINS: I understand that, your Honor.

3 THE COURT: And so if there is -- if there is some
4 other evidence in the case whether the plaintiff, you know, is
5 aware of it or not, and the other evidence is legitimately
6 admissible, that shows that a particular motive or reason for
7 acting or whatever, the fact that the plaintiff might not have
8 known about it I think is kind of beside the point.

9 MS. ATKINS: Well, your Honor, it's the state's
10 attorney's decision to dismiss these 144 cases. If there's
11 transcripts or other evidence indicating that the sole basis
12 for those dismissals was because of Officer Fiorito's greed,
13 scheme, conspiracy, animus towards specific racial or sexual
14 groups, I don't know how they would aid in showing anything
15 toward the probable cause for the arrest of James Dean.

16 THE COURT: Well, there's a claim for punitive
17 damages here, too, right, and there's a claim for malicious
18 prosecution, and so on both of those things, the person's --
19 the defendant's state of mind is more an issue than it would
20 be on a probable cause thing. On the probable cause, it's,
21 you know, largely a question of what was the information he or
22 she had.

23 Let me ask you this. Were these cases all dismissed
24 en masse or were they dismissed one at a time, or how did it
25 happen?

1 MS. HAMILTON: En masse.

2 THE COURT: And not that this is a controlling
3 factor.

4 MS. HAMILTON: I'm sorry, Judge. I need to correct
5 that.

6 MS. ATKINS: You have been misinformed.

7 MS. HAMILTON: If I could just have a second.

8 MR. ERICKSON: The answer is not really yes. The
9 decision to dismiss all of --

10 THE COURT: You know what, since I'm guessing that
11 since you were not an assistant state's attorney at the time,
12 you can't tell me from personal knowledge what the decision
13 was or why the decision was. I'm just asking, were they all
14 dismissed en masse?

15 MR. ERICKSON: That's what I was answering.

16 THE COURT: Let's get to it more directly because
17 it's 4:15 in the afternoon.

18 MR. ERICKSON: They were dismissed. The decision to
19 dismiss all of his DUIs was made at once.

20 THE COURT: At one time. And they got dismissed over
21 a period.

22 MR. ERICKSON: They were dismissed as the cases
23 appeared in court.

24 THE COURT: Fine. Is there anything --

25 Not that this is a controlling factor, and maybe not

1 even a significant factor -- I just want to know -- is there
2 anything of record where the prosecutor explains the
3 dismissals? Typically there wouldn't be. It would be --

4 MS. ATKINS: No, I'm not aware.

5 THE COURT: It would be motion state SOL or motion
6 state nolle pros. That's kind of the way it's usually said.

7 MS. ATKINS: I'm not aware of anything above and
8 beyond.

9 THE COURT: And was the prosecutor that you're
10 talking about --

11 Is it a he or a she?

12 MS. HAMILTON: It's a he.

13 THE COURT: He. Was he deposed in this case?

14 MS. HAMILTON: He was not.

15 THE COURT: Okay. As you stand there right now, do
16 you have any belief as to what he would say if asked why the
17 134, as you said, or 144, as she said, cases were dismissed?

18 MS. HAMILTON: No. I mean --

19 THE COURT: In a temporal sense, when did these
20 dismissals occur vis a vis the grand jury investigation that I
21 keep hearing about? Were they around the time that it became
22 known?

23 MS. HAMILTON: Yes.

24 THE COURT: So isn't it likely that if we really
25 pushed this person on an answer, what they're likely to come

1 out with is we didn't think we could pursue this case because
2 the man was under a grand jury investigation, which you know
3 gosh darned well that you're never going to get in at this
4 trial?

5 MS. ATKINS: Your Honor, he also wasn't --

6 THE COURT: I didn't ask you a question.

7 MS. HAMILTON: Yes, I believe that may come out. I'm
8 not -- that may be the reason why they were ultimately
9 dismissed.

10 I do know that with respect to Mr. Dean's case, that
11 there will be evidence. I will be able to present evidence at
12 trial that his case was dismissed because it was a bad case.

13 THE COURT: But you're going to get to present
14 evidence about why his case was dismissed because that's part
15 of what you have to prove --

16 MS. HAMILTON: Right.

17 THE COURT: -- you know, on the malicious prosecution
18 claim.

19 I guess my concern about this is that I don't know
20 that the dismissal of these cases really tells anybody much of
21 anything about, you know, Mr. Fiorito's motive. I mean, it
22 maybe gives you some sense of some third party, some
23 nonparty's, assessment of how good the cases were, but I think
24 that it's -- I think it's the type of thing that doesn't have
25 a terrifically high degree of probative value, and I think the

1 possibility of, you know -- the possibility of us getting into
2 an area that is clearly going to be out of bounds is fairly
3 significant, number one.

4 And, number two, even if that were not the case, I
5 just think we're going to get into a detour into what was
6 going on in each of those 134 or 144 cases. So I don't think
7 that's admissible.

8 So the next item is the --

9 MS. HAMILTON: Okay, Judge.

10 THE COURT: -- the CR.

11 MS. ATKINS: The CR, your Honor, the sustained
12 finding was relative to Officer Fiorito counting minutes of
13 the transport into the 20-minute required time frame, the
14 observation period.

15 Furthermore, so there was no finding that he
16 falsified any information.

17 THE COURT: What was the finding?

18 MS. ATKINS: The finding was sustained, and I can
19 actually read the finding to your Honor. I just --

20 THE COURT: This is an exhibit somewhere, right?

21 MS. ATKINS: This is an exhibit. This was an
22 exhibit.

23 THE COURT: Which exhibit number?

24 MS. ATKINS: Is it one of plaintiffs' exhibits?

25 MS. SHARIFI: Exhibit 3 plaintiffs', response to

1 defendants.

2 THE COURT: Exhibit 3. I've got as Exhibit 3 part of
3 Mr. Dean's --

4 MS. HAMILTON: Exhibit 1 to plaintiff Dean's exhibits
5 to its responses to defendant Fiorito's motions in limine.

6 THE COURT: There it is. I've got it right here.

7 That's right. I couldn't make head nor tail out of
8 them. I looked at this. I couldn't figure it out.

9 I mean, in terms of exactly what the charge was, it
10 really didn't tell me much of anything.

11 MS. ATKINS: Okay. I can read you --

12 THE COURT: Or what the finding was, rather.

13 No, I've got the document. Tell me where to look.
14 What page do I look on?

15 MS. ATKINS: It would be --

16 Does yours have the case docket stamp on the top,
17 your Honor? Or it is City 9338.

18 THE COURT: Is it page 8 of 22?

19 MS. ATKINS: The one I have is 82 pages long.

20 THE COURT: Okay. There's a little number in the
21 lower right-hand corner. What's the number in the lower
22 right-hand corner, Ms. Atkins, of what you're looking at?

23 MS. HAMILTON: The City number, your Honor? Is that
24 what you're asking?

25 MS. ATKINS: You have a City number there, your

1 Honor.

2 THE COURT: Lower right-hand corner.

3 MS. ATKINS: City 9338. Or if yours is the 23-page
4 one, it is --

5 THE COURT: 9338, no, I've got it. Those numbers are
6 so small that I have to really expand them significantly.

7 9338, I'm there. "Sustained violation of general
8 order 010303A and that the accused... purposely did not
9 complete the warning to motorists in the 20-minute observation
10 period, to wit: The accused improperly conducted the
11 20-minute observation period during a DUI arrest by utilizing
12 the documented transport time as part of the observation
13 period."

14 That's what you are referring to?

15 MS. ATKINS: Yes, your Honor.

16 THE COURT: I'm asking Ms. Hamilton this question.
17 How does that constitute a finding that he falsified
18 something?

19 MS. HAMILTON: Because he then put in his report that
20 he did complete the 20-minute. And if you look at previous
21 pages and you look at what the actual allegations made by
22 Sergeant Hitaris were, this is I think a common thing that
23 happens a lot of times in these investigations is when they
24 actually are going to sustain it, they sustain it based on
25 perhaps the least --

1 THE COURT: Yes, but, okay, so you're going to --
2 What you're just saying right now, do you have a
3 witness who is going to testify to that?

4 MS. HAMILTON: Okay, yes. No, no.

5 THE COURT: That would be a no, right?

6 MS. HAMILTON: I was looking to ask --

7 THE COURT: No, no, I understand. But you're trying
8 to tell me -- what you were about to tell me or --

9 MS. HAMILTON: What I'm about to tell you --

10 THE COURT: What you were getting in to tell me was
11 that, no, they always explain it in a way that makes it look
12 less damaging to the officer, okay. Maybe that's true, maybe
13 it's not, but there is no witness who's going to testify to
14 that in this case.

15 So let's confine what we're talking about about
16 evidence that is going to come in.

17 MS. HAMILTON: Fair enough.

18 So that was what was sustained. The allegations as I
19 had explained them to your Honor previously, if you look at a
20 couple of pages before, if you look at page 9335, you can read
21 for yourself, you know, why Sergeant Hitaris actually
22 initiated the investigation was that he looked at the reports
23 and that it would be impossible --

24 THE COURT: And Fiorito explained when he was
25 interviewed that he counted the travel time, or he counted the

1 travel time as part of the 20 minutes, and the finding
2 basically is you can't count that 20 minutes or you can't
3 count that time as part of the 20 minutes. I don't see this
4 as a --

5 I mean, you know, if all of us were to sit back and
6 kind of analyze it and massage it, you might say, okay, well,
7 he was fudging the rules or he was fudging what he said. I
8 mean, I don't think that's what the finding is. And, you
9 know, you don't have that type of a claimed misrepresentation
10 in this case, at least that I'm aware of, on the part of
11 Fiorito. So I'm excluding that as well.

12 I don't even think that's relevant. And even if it
13 is, I think the possibility of confusion and the need -- all
14 of the evidence that would be needed to explain it I think far
15 outweighs the limited probative value that it has.

16 So that leaves us with what's been referred to as the
17 404(b); namely, the other incidents. So let me hear from you
18 on that.

19 MS. ATKINS: Your Honor, I will begin with Mr. Lopez.
20 As your Honor might be aware, Mr. Lopez was named plaintiff in
21 this matter. His matter has been settled.

22 THE COURT: Right.

23 MS. ATKINS: I can't imagine that he would bring
24 anything toward the table relative to the probable cause for
25 the arrest of Mr. Dean.

1 THE COURT: Yes, and so let me -- just to have you
2 talking about the thing that I'm interested in here, it
3 basically has to do with what I would call motive evidence and
4 possibly, if what Ms. Hamilton says is right, about
5 similarity, misrepresentations or similarity of statements,
6 possibly modus operandi evidence. So talk about it with that
7 in mind.

8 MS. ATKINS: Your Honor, in that respect, as you can
9 imagine, using the same descriptive terms for people who are
10 intoxicated is not unusual. But these --

11 THE COURT: There's only so many ways you can
12 manifest being drunk.

13 MS. ATKINS: Absolutely. Thick tongue --

14 THE COURT: I don't know. Can I take a poll of
15 everybody in the room on that one? I'm being facetious.

16 Go ahead. It's all right.

17 MS. ATKINS: Your Honor, we also, relative to Mr.
18 Lopez, we have a disclosure issue with him as well. He was
19 not disclosed as a witness for Mr. Dean. The fact that he may
20 have been disclosed back in his own case as providing
21 testimony relative to anything relative to motive or intent of
22 Officer Fiorito, that doesn't necessarily mean that we are to
23 suppose that he is going to come in as a 404(b) witness.

24 THE COURT: How are you harmed? You took his
25 deposition, right?

1 MS. ATKINS: I'm sorry?

2 THE COURT: How are you harmed? You took his
3 deposition, right?

4 MS. ATKINS: Well, we did take his deposition, your
5 Honor.

6 THE COURT: Right. 37(c)(1) talks about
7 nondisclosure. You exclude the person unless it's
8 substantially justified or harmless.

9 So how are you harmed, by the fact that they didn't
10 put him on the list until recently?

11 MS. ATKINS: The fact that he didn't put him on the
12 list.

13 THE COURT: Okay. What's your next point?

14 MS. ATKINS: Then we have got Bonnie Klein.

15 THE COURT: What is your next point on him because I
16 don't find that in the least bit persuasive.

17 (Brief interruption.)

18 THE COURT: I mean, I assume you have some
19 overarching argument that relates to all three of these
20 people.

21 MS. ATKINS: The overarching argument relative to
22 these 404(b) witnesses is that they are not substantially
23 similar. Their experiences are not substantially similar to
24 Mr. Dean.

25 THE COURT: So I have a pretty good handle on what

1 the scenario is that both sides have given relating to
2 Mr. Dean.

3 MS. ATKINS: Sure.

4 THE COURT: I have less of a scenario as it relates
5 to Mr. Lopez, Ms. Klein and Mr. Pipkens.

6 So can you give me anything about, you know, sort of
7 a thumbnail sketch of what the scenario is for those three
8 people?

9 MS. ATKINS: Your Honor, I think the most important
10 thing here is that Mr. Dean did not take a Breathalyzer.

11 THE COURT: Yes.

12 MS. ATKINS: Mr. Pipkens did and blew a .19.

13 THE COURT: The number is .08 that you have to
14 exceed?

15 MS. ATKINS: Yes.

16 THE COURT: He blew .19.

17 MS. ATKINS: A .19.

18 THE COURT: All right.

19 MS. ATKINS: Bonnie Klein. Mr. Dean didn't plead
20 guilty. Ms. Klein did.

21 THE COURT: Pled guilty?

22 MS. ATKINS: Pled guilty to a DUI.

23 THE COURT: Okay.

24 MS. ATKINS: Mr. Lopez is married. He's not a
25 homosexual. So I don't know what they could bring into the

1 table.

2 THE COURT: Okay, back up again. So Pipkens blew
3 .19.

4 MS. ATKINS: Yes.

5 THE COURT: Klein pled guilty.

6 MS. ATKINS: Yes.

7 THE COURT: And so putting aside what Mr. Lopez's
8 sexual orientation is or isn't --

9 MS. ATKINS: Sure.

10 THE COURT: -- what are the circumstances surrounding
11 his arrest, at least as you understand them? Lopez.

12 MR. KOWALCZYK: I apologize.

13 THE COURT: That's fine. I don't care who says it.
14 Go ahead.

15 MR. KOWALCZYK: As I understand it, Mr. Lopez was out
16 for the evening dancing with a friend, and on the way out,
17 Officer Fiorito will testify that his lights were not on.
18 There is an automatic feature on his lights which he admitted
19 to. He claims the lights were on, was pulled over, was made
20 to do field sobriety tests.

21 THE COURT: Okay.

22 MR. KOWALCZYK: He did indicate that he had a leg
23 issue from a prior injury. So an issue there was he failed
24 the test or apparently didn't do as well on the test because
25 of his Achilles tendon issue. We did get the medical records

1 of Lopez regarding that. It was an old injury.

2 But Officer Fiorito, I believe, testified that he
3 allowed him to use whichever leg he wanted to stand on. I
4 think it was the standing test. So he did go through field
5 sobriety tests, was arrested for DUI.

6 The case was later either nolleed or SOL'd. I don't
7 know the disposition exactly, but I believe it was nolleed.

8 THE COURT: Ms. Hamilton, let me ask you a couple of
9 questions about each of these other people. So as I
10 understand it, Mr. Dean is going to testify that at some point
11 Mr. Fiorito used the N word, right?

12 MS. HAMILTON: Yes.

13 THE COURT: Is he going to testify -- as you understand
14 it, is he going to testify at the trial -- not whether he
15 testified at the deposition -- is he going to testify at the
16 trial that Mr. Fiorito made any reference to his sexual
17 orientation?

18 MS. HAMILTON: No.

19 THE COURT: Is he going to testify that he had any
20 reason to believe that Mr. Fiorito was even aware of a sexual
21 orientation?

22 MS. HAMILTON: I do not believe he is, no.

23 THE COURT: Okay. So I want to ask you about what
24 you referred to as swearing, and what I wrote down was
25 derogatory references with regard to each of these other

1 people.

2 What would Mr. Pipkens testify about whatever
3 swearing or derogatory references then Officer Fiorito made?

4 MS. HAMILTON: I'm going to ask Mr. Erickson to
5 answer that one. He knows Mr. Pipkens much better than I do.

6 MR. ERICKSON: Directed at sexual orientation. There
7 were words like fag and queen.

8 THE COURT: How about Ms. Klein?

9 MS. HAMILTON: Dyke.

10 MR. ERICKSON: Dyke.

11 THE COURT: Okay. No racial reference. I don't know
12 their race, okay.

13 What about Mr. Lopez?

14 MS. HAMILTON: He was just swearing at Mr. Lopez,
15 telling him to -- which everybody says he did, a constant
16 thing.

17 THE COURT: Like?

18 MS. HAMILTON: "Shut the fuck up" and "do the fucking
19 test" and just swearing at him.

20 THE COURT: And not to get into sort of, you know, a
21 question of how similar different swear words are, the swear
22 words that are most immediate in my memory in this case is
23 "goddamn."

24 MS. HAMILTON: Yes.

25 THE COURT: Okay. Is Mr. Dean going to say that

1 Fiorito used the F word?

2 MR. ERICKSON: I don't believe so.

3 THE COURT: Okay. I mean, these don't strike me as
4 similar enough to be modus operandi evidence. I mean, nobody
5 has told me that any of these situations are situations --

6 See, what we have got in this case, as I understand
7 it, sort of from a 10,000 foot view, is Mr. Dean gets busted
8 by the other officer, goes into the station. He takes care of
9 his business, he comes back out. He's out by his car. At
10 some point, Fiorito approaches the car, tells him to move the
11 goddamned car.

12 Leaving out a lot of the intermediate stuff, Mr. Dean
13 gets in the car, and he's going to testify that he pulled out
14 into the traffic, pulled into the gas station across the
15 street, did a three-point turn and went around and parked the
16 car, at which point Fiorito comes and tells him again to move
17 the goddamned car, which he does by pulling up past the next
18 street, and then Fiorito then does the, quote, unquote,
19 sobriety test and gives him a whole raft of tickets.

20 MS. HAMILTON: Yes.

21 THE COURT: Okay. Is there anything on Lopez, Klein
22 or Pipkens that is at all like that in terms of how it played
23 out?

24 I mean, what I have been told on Lopez -- it was
25 either Pipkens or Lopez -- that it's like right after he comes

1 out of a bar, he gets busted, or pulled over.

2 MS. HAMILTON: On Lopez you're talking about?

3 THE COURT: I don't remember if it was Lopez or
4 Pipkens.

5 MS. HAMILTON: Shortly thereafter, yes.

6 And I think one of the things that we have heard time
7 and time again and we heard from all of these witnesses that
8 we're talking about here today are that he -- that Officer
9 Fiorito, the way that he administers these field sobriety
10 tests to all these people and to everybody else is he's
11 screaming and swearing at all these people while they're
12 trying to do the test. So that's why I'm bringing that up.

13 THE COURT: I did not focus on that all that much as
14 it relates to Mr. Dean.

15 Is that what Mr. Dean's going to say?

16 MS. HAMILTON: That he was yelling at him and telling
17 him and swearing at him, I believe everybody says that.

18 THE COURT: While he was doing the field sobriety
19 test?

20 MR. ERICKSON: Yes.

21 MS. HAMILTON: Yes.

22 THE COURT: You're saying that all of these other
23 people would say something similar about that, that he's
24 screaming at you while you're doing the field sobriety tests,
25 which I suppose a reasonable person could say that's a way of

1 getting you to flunk.

2 MS. HAMILTON: Yes.

3 THE COURT: Or it's a way of getting you to appear to
4 flunk or something like that. I don't know.

5 MR. ERICKSON: They're divided attention tests, and
6 so they're designed to make your brain do one thing while your
7 body is doing another, and that's a distraction, to be yelled
8 at like that.

9 THE COURT: But are they all going to testify --
10 would all four of these people, including Mr. Dean, Lopez,
11 Pipkens, and Klein all testify that while he was doing field
12 sobriety tests, he was screaming and yelling at them?

13 MR. ERICKSON: I believe they would all say that he
14 was belligerent, yes.

15 THE COURT: What do you say about that? You were
16 shaking your head, which I would appreciate it if you didn't
17 do, actually, which I would appreciate if you didn't do.

18 MS. ATKINS: I'm sorry. It was involuntary.

19 THE COURT: Because that is distracting. I have to
20 do divided attention tests all the time, and you just divided
21 my attention the same third way that these guys said that
22 Fiorito did. I'm dead serious about this. It's really
23 annoying, so don't do it.

24 Okay. So now you can talk.

25 MS. ATKINS: Again, I know from your prior comments

1 that it's not what Dean testified to at his deposition; it's
2 what he testifies to at trial. But at his deposition, none of
3 the --

4 Well, the only derogatory term allegedly uttered by
5 Officer Fiorito took place after --

6 THE COURT: The sobriety.

7 MS. ATKINS: -- the tests were administered and he
8 was walking across the street to the station.

9 THE COURT: Was Mr. Dean asked at his deposition when
10 he was doing the sobriety test, was Fiorito saying anything?

11 MS. ATKINS: He was explaining the test to him.
12 That's what Dean testified to.

13 THE COURT: So Mr. Dean did not testify in his
14 deposition that he was yelling at him, screaming at him,
15 anything like that?

16 MS. ATKINS: No. He yelled at him, allegedly yelled
17 at him through the loudspeaker to move the goddamned car.

18 THE COURT: No, that I know.

19 MS. ATKINS: And beyond that, he explained the test
20 to him during the administration.

21 THE COURT: Pause. Is she misrepresenting the
22 deposition?

23 MS. HAMILTON: Judge, I wasn't at his deposition, but
24 Mr. Petrarca just came to me -- Mr. Petrarca just whispered in
25 my ear and said he was never asked that question.

1 MR. PETRARCA: I believe he was never asked that
2 question.

3 MS. HAMILTON: That's what I was --

4 MR. ERICKSON: What Mr. Dean does say is that the
5 belligerence level escalated from the beginning and all the
6 way through, sort of culminating in the N word.

7 THE COURT: Okay.

8 MR. ERICKSON: Your Honor, if I may say something?

9 THE COURT: Go ahead.

10 MR. ERICKSON: Another similarity with all of these,
11 or at least with regard to Pipkens and Dean and Klein, is the
12 driving portion, that Officer Fiorito fabricates the probable
13 cause to make the initial stop, and then he represents in his
14 police reports and the litany of traffic citations that he
15 issues and he exaggerates the bad driving that he needs to --
16 that the state needs to prove to the Court.

17 For example, with regard to James Dean, you're
18 familiar with what James Dean's testimony was with regard to
19 the driving, and yet Officer Fiorito has him driving left of
20 center, failure to stay in the lane, stopping in the middle of
21 an intersection and blocking it for two minutes, causing, you
22 know, that kind of reckless driving.

23 With regard to Mr. Pipkens, he claims that
24 Mr. Pipkens over I believe it was a mile-and-a-half-period
25 length distance violated several traffic violations including

1 swerving in the other lane, violating traffic control devices,
2 et cetera.

3 And then with regard to Ms. Klein, she indicates
4 Mr. Pipkens had two DUIs with Officer Fiorito. One was -- the
5 defense was that he wasn't driving at all, and I believe that
6 is what Ms. Klein says, too.

7 THE COURT: So do you agree that Ms. Klein pled
8 guilty to DUI?

9 MR. ERICKSON: Yes.

10 MS. HAMILTON: Supervision, Judge.

11 THE COURT: So you're going to say that when she
12 admitted her guilt, she wasn't telling the truth? She's going
13 to be a great witness for you.

14 MS. HAMILTON: Well, Judge, we actually --

15 THE COURT: I mean, everybody in the room knows that
16 happens sometimes, okay.

17 All right. So here is what I think I need on this.
18 I don't have enough information.

19 MS. HAMILTON: Okay.

20 THE COURT: I need the following, and it's going to
21 have to be real fast because the trial is starting on Monday.
22 I need to see the police reports on all three of these folks.
23 I don't think I've got those in here. I mean, I've got
24 deposition testimony just from Dean and from Fiorito. I need
25 -- I do not want -- please, please, please, I do not want the

1 entirety of --

2 Have any of them been deposed, all three of them or
3 just one?

4 MS. ATKINS: Two of them.

5 THE COURT: Lopez was deposed.

6 MR. KOWALCZYK: Lopez was deposed. Pipkens was
7 deposed. And I just got the dep today. Bonnie Klein was
8 served but never showed up.

9 THE COURT: Oh. Served by you but never showed up?

10 MR. KOWALCZYK: Well, by our investigator, yes, sir.

11 THE COURT: But she was served with a subpoena for a
12 deposition and didn't come in?

13 MR. KOWALCZYK: Yes.

14 THE COURT: Well, that would be another problem on
15 Ms. Klein.

16 So do you have a ball park sense of how long the
17 Lopez and the Pipkens deps are?

18 MR. KOWALCZYK: I just got the Pipkens one today,
19 Judge. It's like 40 pages. I got it emailed to me.

20 MS. HAMILTON: Judge, I can simplify this. We'll
21 withdraw Ms. Klein as a potential witness based on our
22 conversations here today.

23 THE COURT: So what I need are the reports on Lopez
24 and Pipkens and Mr. Dean. I don't think I've got all of that
25 yet. I may have it as part of the summary judgment stuff, but

1 that's long ago in the blue bin.

2 And then I need the depositions of Lopez and Pipkens.

3 MR. KOWALCZYK: And I don't think Lopez is much
4 longer, Judge. It may be slightly longer because he's a
5 plaintiff.

6 THE COURT: All right. And I need them, like, by
7 first thing in the morning, and then I will decide that later.

8 Now that we have done two motions in limine in
9 45 minutes, we're going to move on. So give me just a second
10 here. So item number three -- I think we'll be moving
11 quicker. We're not going to go past 5:00, and I'm going to
12 make you come back tomorrow to finish up whatever we haven't
13 finished up yet.

14 Item number three is indemnification and sending a
15 message. So let me just tell you basically what the ground
16 rules are on that. Well, there's going to be, as part of the
17 jury instructions, a reference to the fact that the City is a
18 defendant on, you know, certain claims and, you know, on
19 whatever the elements of those are. And so I'm not trying
20 to --

21 Nothing I say affects the jury instructions, and I
22 have had at least a couple other cases where I've instructed
23 on 9-102 claims. That aside, unless the issue of finances or
24 ability to pay is injected into the case by the defendant,
25 then the plaintiff doesn't get to bring up that there's

1 indemnification.

2 And so when I say "injected into the case," there's
3 many ways that that can be injected into the case. And I'm
4 not going to try to give a laundry list because I'm sure I
5 would leave things out. But I'm assuming that everybody --
6 because you guys all do this for a living, that gives you
7 enough guidance so that you know what is fair game and what
8 isn't.

9 So the one addition to that is that if the plaintiff
10 thinks that something has come in that brings this into play,
11 you don't get to just mention it; you have to ask for a
12 sidebar. Okay.

13 MS. HAMILTON: Of course, Judge.

14 THE COURT: All right. As far as sending a message
15 is concerned, I mean, sending a message has to do with
16 punitive damages which are, by definition, only going to be
17 against Fiorito. So you can argue sending a message to
18 Fiorito all you want. You can't argue about sending a message
19 to the city of Chicago because I don't think that's an
20 appropriate argument.

21 MS. HAMILTON: Judge, just as a point of
22 clarification, the jury instruction, I believe, allows us to
23 say sending a message to Officer Fiorito and any other
24 officers.

25 THE COURT: And others like him, yes, others similar.

1 Whatever the lingo of the instruction is, that's fine.

2 MS. HAMILTON: Thank you.

3 THE COURT: Reference -- number 4 is reference to
4 settlement or disposition of other lawsuits. That's not
5 objected to, so we don't need to talk about that.

6 Number 5 is lost wages. Okay. So having read what
7 both sides --

8 Let me ask you this. What is he going to say? What
9 do you think he's going to say as you stand there right now?

10 MS. HAMILTON: Yes.

11 THE COURT: Let me rephrase the question in that way.

12 MS. HAMILTON: Mr. Dean holds a very strong belief
13 that the fact that he has brought this lawsuit has impacted
14 his ability to get certain grants and perform certain
15 contracts and that he has, therefore, lost certain
16 opportunities as a result. And he believes he has been told
17 by --

18 THE COURT: By whom?

19 MS. HAMILTON: By some representative from the city
20 of Chicago that they're not going to consider, even consider
21 any of his applications if he is a litigant against the City.

22 THE COURT: Has he ever identified --

23 But this came up in his deposition, I'm assuming,
24 right?

25 MS. ATKINS: Yes.

1 THE COURT: Because Mr. Dean, I'm sure, didn't
2 hesitate to tell anybody about it.

3 Did somebody ask him who's the person who told you
4 this?

5 MS. ATKINS: They did.

6 THE COURT: What did he say?

7 MS. ATKINS: He didn't identify them.

8 THE COURT: Did he say, I don't know, I don't
9 remember, or I won't tell you, or what?

10 MS. ATKINS: No. I believe he said: It was a
11 representative of your client, I mean, the City.

12 THE COURT: Okay. And so let's assume you get past
13 the problems that are inherent in that. What is it that he's
14 going to say that he lost? It's not going to be that he had
15 some contract that was taken away.

16 MS. HAMILTON: Correct.

17 THE COURT: It's going to be, I didn't get a
18 contract.

19 MS. HAMILTON: Yes, I believe so. I believe -- and
20 as your Honor is well aware, it's a little difficult to answer
21 that question.

22 THE COURT: I understand.

23 Do you want to contribute anything, Ms. Li?

24 MS. LI: At one point Dean did tell me. He
25 identified a person, I believe the name was Ann, who told him

1 that --

2 THE COURT: Just the first name?

3 MS. LI: Just the first name.

4 THE COURT: As we would say in criminal law, Ann Lnu,
5 L-n-u, last name unknown.

6 MS. LI: And then it was at some housing meeting, and
7 I went to the website he referred me to. I couldn't find it.
8 I couldn't find any transcript. I couldn't find any other
9 further information about this.

10 THE COURT: Just as an aside, there was a criminal
11 complaint filed last week. The actual official title of it on
12 the docket is U.S. v. Fnu Lnu, first name unknown, last name
13 unknown. Fnu Lnu. I'm not making it up. You can go on the
14 recently filed cases and you will see it. It was last week.

15 Okay. Is there any other lost income evidence other
16 than what you have just talked about? Are there other topics
17 of lost income? I mean, was he making -- did he have a job
18 where he had wages where he, you know, didn't come into work,
19 he wasn't able to come into work because he had to go to court
20 or anything like that? I mean, I remember Mr. Dean saying at
21 some point that he was in the real estate business.

22 Did he say that there was some sale that he couldn't
23 close because he had to concentrate on going to court,
24 anything like that?

25 MS. LI: No.

1 And what complicates this, as was discussed in the
2 deposition, he was employed as a real estate broker at a firm.
3 He was terminated from that position several months before
4 this incident happened.

5 THE COURT: Before this.

6 MS. LI: He also had a nonprofit.

7 He was working on his own for homeless veterans is
8 what he's going to testify to. He was unable to assist his
9 clients because of this. He was unable to get the contracts
10 needed or get or have the ability to even see the buildings he
11 needed to see in order to submit the contracts needed.

12 THE COURT: Because of this being that he had --

13 MS. LI: Because of the lawsuit that he filed, this
14 lawsuit, and that's what he's going to say.

15 THE COURT: Wait a second. I'm not talking about
16 what he's attributing to other people having told. I'm
17 focusing on what you just said, and it sounded like to me that
18 part of what you were just saying is that he had this
19 nonprofit and there were certain things that he couldn't do
20 because of this.

21 MS. LI: Because of this.

22 THE COURT: The "this" is the lawsuit.

23 MS. LI: Correct.

24 THE COURT: And is the "this" the fact that he had to
25 spend so much time on the lawsuit?

1 MS. LI: On this current lawsuit, yes.

2 THE COURT: Yes.

3 MS. LI: Not the DUI.

4 THE COURT: Not the DUI but the lawsuit.

5 MS. LI: Yes.

6 THE COURT: Okay.

7 MS. HAMILTON: Well, it's, of course, our position
8 that this lawsuit resulted from.

9 THE COURT: I understand, okay.

10 So let's just put that part to the side for a second
11 and just talk about the other stuff. So the problem I have
12 with the testimony about I was, you know, basically cut out of
13 the ability to get other contracts or business with the City,
14 it strikes me that it's too speculative to be relevant that he
15 actually would have gotten those contracts.

16 It's not directly analogous, but there is a doctrine
17 in Illinois law which is oftentimes followed in federal court
18 having to do with getting lost profits for a business that's a
19 start-up. And the general rule is -- it doesn't apply in
20 every case. But the general rule is is that you can't get
21 lost profits for a lost business opportunity for a startup
22 because there's nothing like a track record and there's no way
23 of proving, you know, what you would have gotten.

24 This strikes me as a similar situation except more so
25 because it's not just that he would have had to have bid on

1 the contract; he then would have had to win the contract, you
2 know, get through all of the approvals, actually perform and
3 actually get money. We don't know when any of those contracts
4 were.

5 That lost income evidence just strikes me as way too
6 speculative, so I'm excluding it under Rule 402 but really
7 more Rule 403.

8 As far as the rest of it is concerned, I guess what
9 I -- now that you have a clear sense, I think, on the defense
10 side of what you're talking about -- and let me just sort of
11 describe it in a nutshell so that we're all on the same page.
12 He's saying that because of the improper arrest and the
13 malicious prosecution, I filed this lawsuit, and because I had
14 to spend all this time on this lawsuit, I was not able to do
15 A, B, C and D. Okay.

16 Let's cut out of it that nobody gave me a contract
17 because of the lawsuit because he can't testify about that.
18 That's what I think I just said. What I do not know is
19 whether what I just described would be sort of within the
20 realm of what you would call proximate cause. I just don't
21 know. There may be law about this, so I'm going to need you
22 to try to find something for me. And we'll talk about this
23 more at another point in time before anybody has to give an
24 opening statement.

25 Number 6. Bar evidence regarding medical,

1 psychiatric treatment and bills, et cetera, et cetera, et
2 cetera. And the plaintiff doesn't object to putting in
3 evidence about medical or psychiatric treatment or having
4 incurred medical bills. And the plaintiff, you don't object
5 to that. The part you object to is basically him being able
6 to say, I wasn't able -- I had all these symptoms, but I
7 wasn't able to go seek care because I didn't have any money.

8 MS. HAMILTON: Correct.

9 THE COURT: What's wrong with that?

10 MS. ATKINS: Well, your Honor, his lack of funds
11 doesn't stem from this lawsuit.

12 THE COURT: Yes, I understand.

13 MS. ATKINS: As counsel just said, he lost his
14 primary source of income months before he was arrested.

15 THE COURT: Here is the way I see this playing out.
16 It's one of two things. He's going to get on the stand and
17 testify, I was depressed, I had sleepless nights, et cetera,
18 et cetera, et cetera. It may be that the direct ends there
19 and then somebody gets up on cross and says: Were you ever
20 treated by a doctor? And you say, no. He says, no.

21 And then the redirect is: Why weren't you treated by
22 a doctor? I didn't have any money. I couldn't afford to go
23 get treated by a doctor.

24 Okay. So that's way number one that it would come
25 up. Let's assume that knowing that, you don't ask that

1 question on cross. And since Ms. Hamilton knows that you're
2 not going to ask the question on cross, she says on direct,
3 did you ever seek treatment for it, because she figures, well,
4 a juror might say, wait a second, the guy says he has
5 sleepless nights. Why didn't he ever go get treated for it?
6 And she wants to be able to explain that.

7 I think it's legitimate. You can do it. I think
8 it's perfectly legitimate. You can do it. Okay.

9 Number 7. Reference to other encounters with Officer
10 Fiorito. That is the White Palace Grill. That is not
11 objected to.

12 Reference to media coverage. So the plaintiff says
13 they don't object except to the extent it's used for
14 impeachment purposes. And I guess, for me, that's good enough
15 for now with the caveat that if you decide you're going to
16 want to go into something for impeachment purposes, you must
17 bring it up at a sidebar first.

18 MS. HAMILTON: Understood.

19 THE COURT: Number 9, to bar reference to witnesses
20 not in the pretrial order. Who exactly are we talking about?

21 So this whole thing about, if you don't have it in
22 the draft of the pretrial order, it's out, that's baloney.
23 Come on. Seriously, it's just baloney.

24 So is there somebody who is not in the pretrial order
25 aside from Lopez, which we have talked about, that you think

1 that the plaintiff's going to call that you think wasn't
2 disclosed in some, you know, in the 26(a)(1s)?

3 MS. ATKINS: No.

4 THE COURT: Okay. So I don't think we have an issue
5 to talk about that.

6 Bar any testimony or evidence regarding the Monell
7 claim. Well, I think that's probably wrapped up with this
8 thing about other act evidence, so we'll just table that for
9 now.

10 Number 11 is bar testimony, reference or evidence of
11 other DUI officers or other police misconduct. There is no
12 objection to that, so that one's granted.

13 Number 12 is bar any testimony, reference or evidence
14 of alleged motive based on race or sexual orientation. Well,
15 he can say the thing about what he contends Fiorito told him,
16 the use of the N word and other words, and the testimony that
17 is referenced from his deposition in the response.

18 So the thing that I guess I have a question about is
19 the sexual orientation evidence, and it kind of goes back to
20 what I asked before. So what I was told before when I asked
21 questions about this, in other words, earlier today, is I was
22 told that Fiorito didn't say anything about his sexual
23 orientation and that there's not -- that there's not going to
24 be any testimony that Fiorito would have even had any reason
25 to understand whatever Mr. Dean's sexual orientation is.

1 Did I catch that right?

2 MS. HAMILTON: We don't believe that there would be
3 testimony.

4 THE COURT: Okay. So how is evidence about his
5 sexual -- how is evidence about sexual orientation as a motive
6 even relevant then?

7 MS. HAMILTON: I don't think it is, Judge. I'm
8 sorry.

9 THE COURT: There you go, fine. That one is granted.
10 Number 13. Evidence of a grand jury investigation.
11 There is no objection to that, so that's granted.

12 Number 14 is the thing about the summary suspensions.
13 Okay. So I think you are correct that the Hurlburt case,
14 H-u-r-l-b-u-r-t, just talks about collateral estoppel effect
15 or what people in a more modern way call issue preclusion. I
16 get that.

17 So what's the basis for admissibility? So what
18 you're talking about here is it's classic hearsay. It's an
19 out-of-court statement by somebody saying there was no
20 probable cause, and you want to put this out-of-court
21 statement in to prove that there was no probable cause.

22 MS. HAMILTON: Well, so my argument on this, Judge,
23 is that there is obviously a malicious prosecution claim. And
24 my understanding of the law -- I'm sure your Honor will
25 correct me if I am wrong about this -- but malicious

1 prosecution requires that the defendant either initiated or
2 caused to continue judicial proceedings against the plaintiff.

3 THE COURT: Okay.

4 MS. HAMILTON: So my position and my argument to your
5 Honor is that he actually initiated two different types of
6 judicial proceedings.

7 THE COURT: Oh, so both the DUI and the summary
8 judgment.

9 MS. HAMILTON: Yes, sir.

10 Therefore, the finding on the statutory summary
11 suspension is relevant to the malicious prosecution claim with
12 respect to the fact that, you know, it was terminated in the
13 plaintiff's favor.

14 THE COURT: In a manner consistent with innocence
15 even.

16 MS. HAMILTON: Correct.

17 THE COURT: Interesting. How about that?

18 MS. ATKINS: It's a very novel argument, your Honor.

19 It's our position that introduction of this finding
20 at the summary suspension hearing will do nothing but confuse
21 the jury. It is their job to determine whether or not the
22 elements of malicious prosecution as they're being presented
23 in this litigation have been met, and, you know, beyond what
24 your Honor called classic hearsay.

25 THE COURT: Yes, but, I mean, it's actually being

1 offered for another purpose is what Ms. Hamilton has told me.
2 It's being offered for the purpose of showing that this other
3 litigation was terminated in his favor in a manner consistent
4 with innocence.

5 MS. SHARIFI: May I say something, your Honor?

6 THE COURT: Yes.

7 MS. SHARIFI: One thing, also, is that summary
8 suspension is not a termination of the underlying DUI
9 prosecution. Mr. Dean --

10 THE COURT: It's a separate case is what Ms. Hamilton
11 was saying.

12 MS. SHARIFI: However, Mr. Dean's DUI prosecution
13 continued after summary suspension indicating that this non-
14 probable cause finding had to do simply with the termination
15 of his driving privileges absent from whether --

16 THE COURT: I get that. Summary suspensions are
17 determined by the secretary of state, right?

18 MS. HAMILTON: Yes, but it's a separate --

19 THE COURT: No, no, I understand.

20 So let me restate the argument because I want to make
21 sure I'm getting it right. So what you're saying is that
22 Fiorito didn't just initiate one case.

23 MS. HAMILTON: Correct.

24 THE COURT: The DUI case. He initiated two cases,
25 the DUI case and the summary suspension case.

1 MS. HAMILTON: Correct.

2 THE COURT: The DUI case we have had discussion about
3 how that was terminated and so on. What you are saying here
4 is that, well, the malicious prosecution claim extends to both
5 of these things.

6 MS. HAMILTON: Yes.

7 THE COURT: And we want to prove that the summary
8 suspension case was terminated in his favor in a manner
9 consistent with innocence, and that's why the finding of the
10 hearing officer, or whoever it was, is pertinent.

11 MS. HAMILTON: It's a judge. It's the same judge
12 that --

13 THE COURT: It's the same judge.

14 MS. HAMILTON: It's a judicial proceeding.

15 THE COURT: Judicial proceeding.

16 MS. HAMILTON: Yes, it's a proceeding that is
17 instituted to revoke driving privileges, and it's a judicial
18 proceeding.

19 THE COURT: What did they do, Ms. Jackson, take your
20 office away from you?

21 MR. ERICKSON: It's separate and distinct.

22 THE COURT: What about that? I mean, facially at
23 least, that makes sense to me.

24 MS. ATKINS: Well, your Honor, first and foremost,
25 isn't it the plaintiff who initiated the summary suspension

1 hearing?

2 THE COURT: I don't know. I mean, I assume that that
3 all flows from the fact that he gets a DUI ticket.

4 MS. HAMILTON: Judge, the law enforcement's forum
5 report is what initiates, and it's not that the plaintiff
6 initiated. The plaintiff did ask for a hearing, but the
7 proceedings to revoke his driver's license were initiated.

8 THE COURT: Does that all happen because he didn't
9 take the Breathalyzer, or is it irrespective of whether he
10 takes the Breathalyzer?

11 MR. ERICKSON: It's dependent upon that.

12 THE COURT: So if he had taken the Breathalyzer --

13 In other words, not taking a Breathalyzer is a basis
14 for instituting a summary suspension.

15 MR. ERICKSON: His refusal to take a Breathalyzer
16 causes the officer to fill out a form called a law enforcement
17 forum report and notices under suspension --

18 THE COURT: That's what I've always understood.

19 MS. HAMILTON: Right.

20 MS. ATKINS: Your Honor, if I may, refusal to blow,
21 as I understand the relevant statutes, results in an automatic
22 suspension. And so it's not that Officer Fiorito said, oh,
23 I'm going to fill out this paper.

24 THE COURT: You're saying that Mr. Dean started the
25 summary suspension proceeding on himself? Nobody is that

1 stupid.

2 MS. ATKINS: Mr. Dean requested the summary
3 suspension hearing that Ms. Hamilton --

4 THE COURT: He requested a hearing, but that's just
5 like saying, I want to go to trial on my criminal case. That
6 doesn't mean he started the criminal case.

7 MS. ATKINS: Sure. But --

8 THE COURT: Let me ask you this direct question.

9 MS. ATKINS: Yes.

10 THE COURT: What is it that you --

11 You don't have a summary suspension proceeding unless
12 you're charged with DUI, right?

13 MS. ATKINS: Sure.

14 THE COURT: He was charged with DUI by the ticket
15 that Officer Fiorito gave him, right?

16 MS. ATKINS: Right.

17 THE COURT: So Fiorito initiated the summary
18 suspension. I think the plaintiff is right on this. Okay.
19 So I'm going to give you a chance to think about it a little
20 bit more. And if you have got something else to give me, I
21 will let you file a reply on that issue by Friday. This is on
22 number 14.

23 MS. ATKINS: Thank you, your Honor.

24 THE COURT: Okay. And that is all of the plaintiffs'
25 stuff, and I think actually we may be able to get through most

1 of the --

2 That's all of the defendants' motions.

3 MS. HAMILTON: We filed one yesterday, Judge.

4 MS. ATKINS: We did file --

5 THE COURT: Oh, right, I saw that.

6 MS. ATKINS: -- a 15th one.

7 THE COURT: Right, right, right.

8 MS. HAMILTON: Which basically is going to come up
9 anyways on plaintiffs' number 1, so you can kind of deal with
10 them at the same time, plaintiffs' first motion in limine
11 about arrests, subsequent -- prior and subsequent arrests.

12 THE COURT: Pause for a second. Let me just pull it
13 up here. I didn't bring it out with me.

14 (Brief interruption.)

15 THE COURT: Okay, relates to plaintiffs' motion in
16 limine number 1. Now I get it.

17 MS. HAMILTON: Yes.

18 THE COURT: We'll take Defendants' 15 in connection
19 with the plaintiffs' motions in limine.

20 So the argument -- so plaintiffs' motion in limine
21 number 1 has to do with arrests that did not result in
22 convictions, which is also what defendants' motion in limine
23 15 concerns, right?

24 MS. HAMILTON: Yes, Judge.

25 THE COURT: Okay. So articulate for me the theory on

1 which the arrest that didn't result in the conviction would be
2 relevant. You have done it, but do it again here so that we
3 have something to set the scene.

4 MS. ATKINS: Our argument is focused on Mr. Dean's
5 two arrests that took place subsequent to his arrest by
6 Officer Fiorito.

7 THE COURT: Yes.

8 MS. ATKINS: It has been Mr. Dean's position
9 throughout this litigation that he was not driving the vehicle
10 voluntarily, that he was forced to do so, that he blindly
11 follows the instructions of law enforcement.

12 The two subsequent arrests, one in May, I believe it
13 was May of 2011 -- or excuse me -- June of 2011 and the second
14 in May of 2012, both involved charges of --

15 THE COURT: Trespass to property.

16 MS. ATKINS: -- criminal trespass, and one was also
17 disorderly conduct in addition to the criminal trespass.

18 One was at a Starbucks; the other was at the
19 secretary of state's office, the administrative hearing
20 officer.

21 THE COURT: So I'm going to assume that what happened
22 there is that -- particularly given the disorderly charge on
23 the one -- that Mr. Dean was in these places. It wasn't like
24 he went in after hours or broke in or anything like that. He
25 was there and there was some sort of a disturbance.

1 MS. ATKINS: Absolutely, your Honor.

2 THE COURT: So, in other words, it wasn't that he
3 didn't have authority to enter; it was he exceeded the scope
4 of his authority.

5 MS. ATKINS: He outwore his welcome. And when he was
6 asked to leave, he got, according to the reports, belligerent
7 and loud and aggressive and refused to leave, and it required
8 the police to remove him.

9 THE COURT: Okay. So this is what ties in with the
10 theory that you just articulated, is that you think that the
11 fact that he didn't leave when he was asked to at the
12 Starbucks and at the secretary of state's office has some
13 bearing on the accuracy or inaccuracy of his claim that he
14 followed Fiorito's instructions because Fiorito told him to.

15 MS. ATKINS: No. It's my argument, your Honor, that
16 while Mr. Dean says that he always obeys police officers and
17 law enforcement officers, and that's why he simply got into
18 the car, knowing that it was impounded, knowing that he didn't
19 have a right to drive the car. Here he has two subsequent
20 instances where he didn't heed the direction of police
21 blindly.

22 THE COURT: Then I'm guess I'm not getting it. So
23 you're not tying it -- you're not saying that this is relevant
24 because it undercuts his account of what he did in the
25 incident. You're saying that it's relevant -- and I'm looking

1 at page 2 of your motion right now, motion number 15. You're
2 saying that it's relevant because -- or to the extent that
3 Mr. Dean gets on the witness stand and says that, because of
4 what happened to me here, I always do what law enforcement
5 tells me to do.

6 That's what the second paragraph on page 2 of your
7 motion says.

8 MS. ATKINS: Well, your Honor --

9 THE COURT: So which is it?

10 MS. ATKINS: Let me just clarify. Mr. Dean's
11 position has been, even before he interacted with Officer
12 Fiorito, that he always complied with law enforcement, and he
13 continued to act in that manner with Officer Fiorito, and
14 that's why he got into the car.

15 THE COURT: I understand. But you actually think
16 that the plaintiffs' lawyer is going to elicit from him -- I
17 mean, this would be like a "Law & Order" moment where the
18 person -- where the defense lawyer steps into the big bucket
19 of you know what, where the judge has already excluded all of
20 the other act evidence, and either the defense lawyer or the
21 defendant who is on the witness stand steps into the big
22 bucket of you know what when he or she says, oh I always do X,
23 Y or Z. And then Jack McCoy stands up and says, aha, what
24 about, you know, the other four murders that you committed the
25 week before last.

1 Okay. That's not likely to happen, all right, in
2 real life. It doesn't -- you know, it doesn't even -- well,
3 it doesn't even happen in criminal cases, but whatever.

4 MS. ATKINS: If I may, in addition to that, I
5 understand that you would expect it not to happen, but I would
6 have been remiss had I not --

7 THE COURT: Well, and again --

8 MS. ATKINS: -- brought it up.

9 THE COURT: -- to the extent Mr. Dean, you know,
10 might tend to run on, as he has in court on a couple of
11 occasions, and I'm not talking about any settlement
12 conferences; I'm just talking about appearances in court.
13 Well, okay.

14 MS. HAMILTON: Judge, clearly, if you just read the
15 actual words of their motion, they clearly are seeking to
16 introduce these subsequent arrests as propensity evidence. It
17 basically just says that in the bottom of the second page of
18 their motion.

19 Dean says: Plaintiffs' subsequent arrest for
20 criminal trespass and disorderly conduct, breach of peace, is
21 permissible to corroborate the defendants' position that the
22 plaintiff was acting in such an erratic and unreasonable
23 manner that a reasonable officer" blah-blah-blah.

24 THE COURT: May I ask this question? What became of
25 the June 2011 trespass and disorderly charge? What became of

1 it?

2 MS. HAMILTON: The most recent arrest is still
3 pending.

4 THE COURT: The one in 2011.

5 MS. HAMILTON: I think everything has been dismissed
6 except there's the most recent one is still pending.

7 THE COURT: Okay. So Mr. Dean presumably -- the one
8 that is still pending, let's put that to the side.

9 Presumably what Mr. Dean is going to say, if I let
10 you put this in, and you say, well, isn't it a fact, Mr. Dean,
11 that on June the 28th of 2011, you went into a Starbucks and
12 they asked you to leave, and then the police came and you
13 refused to leave and started screaming and yelling and
14 creating a disturbance, he's going to say, oh, no, that did
15 not happen that way.

16 All right. So then what's going to happen? Are you
17 going to call the cop? Are you going to call the barista?
18 I'm just asking.

19 MS. ATKINS: If I need to.

20 THE COURT: Well, do you know who they are?

21 MS. ATKINS: Yes. They were the complainants, signed
22 complainants.

23 THE COURT: Have they been subpoenaed for trial?

24 MS. ATKINS: They have not. I just received this
25 information yesterday.

1 THE COURT: Okay.

2 MS. ATKINS: Mr. Dean never supplemented any
3 information relative to his arrest.

4 THE COURT: Is it correct that the June 2011, charge
5 was dismissed, SOL'd or whatever?

6 MS. ATKINS: The May 2011 -- or June 2011 I have as
7 June 28th, 2011, SOL'd, bail bond forfeiture, SOL'd.

8 THE COURT: Okay. So the line on the half sheet, it
9 says BF/SOL, right?

10 MS. HAMILTON: That means, Judge --

11 THE COURT: I know exactly what it means. Been
12 there, done that.

13 MS. HAMILTON: The witness and the plaintiff didn't
14 show up.

15 THE COURT: Nobody showed up.

16 MS. HAMILTON: Right, right.

17 THE COURT: Right, okay. All right.

18 MS. ATKINS: But, your Honor, if I may just also add,
19 it does go toward Mr. Dean's claims of emotional damages.

20 THE COURT: In what way?

21 MS. ATKINS: In the sense that, you know, if he --

22 Again, we're talking about ifs and buts here, and I
23 hate to do that, but it's hard to anticipate what Mr. Dean may
24 say.

25 But if he does start to talk about, I've never

1 behaved this way, I was so emotionally scarred by this
2 instance, I'm afraid of the police, I would never behave in
3 such a manner, I can't get out of bed, I can't do this, I
4 can't do that, and then he's --

5 THE COURT: Okay.

6 MS. ATKINS: -- arrested subsequently.

7 THE COURT: Here's my view on this.

8 So putting aside testimony along the lines of what
9 you just described, I really do think that this is propensity
10 evidence. It's nothing like any of the events that happened
11 here, you know, at least not close enough alike to be -- to
12 constitute modus operandi evidence or something like that or
13 anything else that make it a properly admissible thing under
14 404(b).

15 If, on the other hand, Mr. Dean, unthinkingly or even
16 thinkingly or something in between, says something at trial
17 along the lines of the "oh, I would never or I never have"
18 type of statement that you just described, then he potentially
19 will be opening the door to this.

20 And what the rule will be is just as I said to Ms.
21 Hamilton, if you think he's opened the door, you ask for a
22 sidebar, we discuss it at a sidebar. And I'm going to assume,
23 just as you're going to talk to your witnesses about all the
24 little doors they may open, that you're going to do your best
25 to talk to Mr. Dean about all those little doors, and some not

1 so little, that may be opened and so on, okay.

2 So number 1 is granted subject to, you know, further
3 developments at trial, let's just put it that way.

4 Number 2, in-court statements while he was
5 unrepresented. Well, what I got from the response to this
6 motion is you probably don't intend to put in any because the
7 response to the motion is what the heck are they talking
8 about.

9 MS. HAMILTON: Exactly.

10 MS. ATKINS: Well, we don't know what they're talking
11 about.

12 THE COURT: Well, let me just say this. So, first of
13 all, it doesn't appear to me that there's any intention to put
14 in any of this stuff.

15 Second of all, it's going to be -- it's going to be
16 relatively difficult, I will say, to convince me that you
17 should -- that you should allow Mr. Dean -- that I should
18 allow into evidence something that Mr. Dean may have said at a
19 status hearing or in connection with a motion to appoint
20 counsel or during the period of time that he was pro se.

21 You know, part of that may be I guess I wouldn't have
22 probably given him the judicial equivalent of the Miranda
23 warnings, not that they necessarily apply because he's
24 certainly not in custody and it's not a criminal proceeding,
25 but I just don't think that that would be particularly fair

1 because we were having, you know, what I think would be fairly
2 described as wide-ranging discussions, talking about what's
3 going on with this case, why don't you have a lawyer and
4 things like that, and I just don't think it would be fair to
5 then, you know, jam him with statements that he might have
6 made in that regard, plus you don't have anything specific
7 anyway.

8 Number 3. So I'm assuming Fiorito isn't going to be
9 wearing a dress uniform since he's retired, right?

10 MR. KOWALCZYK: Correct.

11 THE COURT: And the response to this motion basically
12 said we're not planning to put that in unless, of course, all
13 of this stuff about prior misconduct comes in, in which case
14 we certainly reserve the right to say, wait a second, he has
15 gotten this accommodation and that accommodation. I would
16 assume that if I allow in the prior evidence of bad conduct
17 that you wouldn't -- that you're not going to argue that he
18 can't put in the good stuff.

19 MS. HAMILTON: Under the rules they can --

20 THE COURT: Yes, okay.

21 So is there anything else that anybody thinks I have
22 to decide on that motion?

23 MS. HAMILTON: No, Judge.

24 MS. ATKINS: Your Honor, we had raised one issue
25 about -- because in the motion they had referenced Officer

1 Fiorito's personal experiences as being something that they
2 wanted to bar inclusion of or testimony regarding, and not
3 knowing exactly what it was that they were referencing with
4 personal experiences, I took the avenue in my response to
5 simply say his personal experience in his professional
6 capacity such as -- you know, his experiences that would lead
7 to the decisions that he made relative to Mr. Dean.

8 THE COURT: So what is he going to say like that?

9 MS. ATKINS: I don't know what.

10 THE COURT: Well, we're three days before trial.
11 When are you going to know? When are you going to know,
12 seriously?

13 MS. ATKINS: Well, no. Seriously, your Honor, if
14 we're talking about what led up to the probable cause, I think
15 that Officer Fiorito should certainly be able to talk about
16 the circumstances he faced with Dean and his personal
17 experiences in similar situations. So it's more of his
18 professional experience relative to effectuating arrests,
19 assessing persons, et cetera.

20 THE COURT: What else would you like to tell me?

21 MS. HAMILTON: My only response to that, Judge, is
22 that, in my opinion, we could be walking a very close line to
23 opening a door if Officer Fiorito decides to testify about his
24 vast experience.

25 THE COURT: Well, you're taking the words right out

1 of my mouth.

2 So here's the deal. You know, I can certainly
3 understand circumstances in which how an officer perceives a
4 particular event might be influenced based on the officer's
5 experience, okay. And so I don't think that I'm in a position
6 to say that it is not relevant.

7 Having said that, the more Officer Fiorito talks
8 about his experience, the more about his experience is going
9 to be relevant, and that includes bad as well as good. And
10 so, again, I'm just going to --

11 And I haven't ruled yet on the other act stuff, but
12 let's assume for purposes of discussion that I end up
13 excluding the other act evidence, all of the other act
14 evidence, and some of it I've already excluded. Who knows?
15 Officer Fiorito may say something in testifying about his, you
16 know, vast experience and what he's seen that might open the
17 door to some of the things that I have excluded. So that
18 could happen.

19 I think as I sit here right now, I mean, my ruling is
20 I'm not prepared to say that every possible thing having to do
21 with his experience is irrelevant, so I'm going to deny the
22 motion, but, you know, people have to understand that doors
23 can get opened by anybody. Okay.

24 So moving on, and we're going to try to finish this
25 here because we're actually pretty close.

1 MS. HAMILTON: Okay.

2 THE COURT: Number 3 -- number 4, rather, is can you
3 ask leading questions to police officers. The answer is sure,
4 you can. That's fine.

5 MS. HAMILTON: Thank you.

6 THE COURT: Number 5, failure to file tax returns.

7 So, I mean, if no evidence comes in about lost wages,
8 it tends to drop out of the picture, right? And it sounds
9 like there is no evidence about lost wages because the
10 nonprofit stuff really isn't about wages.

11 MS. HAMILTON: Right.

12 THE COURT: So I think the tax return thing is a
13 nonissue.

14 And so what is the issue about Public Aid?

15 MS. HAMILTON: If he is utilizing any right now, I
16 would just like it not to be asked about.

17 THE COURT: Are you going to ask him about that?

18 MS. ATKINS: I didn't even know he was utilizing it,
19 your Honor.

20 THE COURT: I mean, even if you did, it would not be
21 a really particularly intelligent thing to ask because you
22 might have jurors who have friends, relatives and other people
23 who are under Public Aid and would be offended by that. So
24 I'm going to assume that's not going to come up, and if it is,
25 just tell me before you do it so that I can deal with it.

1 Other lawsuits. So the one thing here that I
2 thought, you know, had some potential relevance and probative
3 value is referred to on page 5 of the defendants' response.
4 It's a case called Dean v. Draper and Kramer in which Mr. Dean
5 allegedly said in a notice of appeal that he suffers from
6 clinical depression as a result of whatever it is he contended
7 that Draper and Kramer did to him. And he was terminated, you
8 know, approximately around the same time as the incident in
9 this case. And he's contending that he's suffered emotional
10 distress and depression as a result of what happens here.

11 So my question is: Why wouldn't it be relevant for
12 the defendant to bring up in questioning Mr. Dean, well, you
13 have testified about all this depression; isn't it a fact that
14 you attribute your depression to conduct at the hands of your
15 former employer, Draper and Kramer?

16 MS. HAMILTON: I think that just bringing up the fact
17 that there's a prior lawsuit is what I'm taking issue with. I
18 understand, your Honor, what your reference is to, and that
19 does seem fair if it's part of his depression that had
20 something to do with this previous termination. But that
21 would be enough. We don't have to inform the jury that
22 involved a previous lawsuit.

23 I'm concerned about the jury hearing and believing
24 that Mr. Dean is litigious, and there's been case law that
25 that is unfairly prejudicial. And so if your Honor is

1 inclined to let that in at all, I would ask that it be --

2 THE COURT: So let me play it out for you this way.
3 Let's say what happens is that I agree with you and I say you
4 can bring up defendant's -- you can bring up that Mr. Dean has
5 attributed his depression to a different -- to the conduct of
6 his former employer, Draper and Kramer, okay.

7 And let's say if he says, yes, that's right, then
8 we're done. If he says anything other than, yes, that's
9 right, then if he tries to hedge, or if he tries to explain,
10 or if he tries to say, well, that's different, then where are
11 we? And that would --

12 Honestly, with any witness, there would be some risk
13 of that happening.

14 MS. HAMILTON: Absolutely, Judge. And, obviously, I
15 would endeavor not to open a door about the actual lawsuit.

16 I mean, I think that it would be fair to ask him, and
17 I would actually probably ask him myself to front it, that,
18 you know, that he also was depressed over having lost his job.
19 I think that's fair. I think that that is a fair thing for
20 the defendants to get out, to be able to argue that his
21 depression that he suffered -- he's saying he's suffering from
22 the arrest by Fiorito may also have been, you know, partly
23 caused by this other event that has nothing to do with Officer
24 Fiorito. That all seems fair to me.

25 What I would like to keep out and I think that there

1 is, you know, law to support --

2 THE COURT: Let's say you do it that way. Let's say
3 you front it on direct and you say, Mr. Dean, isn't it fair to
4 say that your depression is partly caused by the way you were
5 treated by your former employer, and he says yes. Okay. Why
6 wouldn't it be okay then at a minimum for the defendant on
7 cross to say, Mr. Dean, I just want to go back to that for a
8 second. Didn't you actually say in writing that your, quote,
9 clinical depression has been a result of, close quote, what
10 your former employer did to you?

11 MS. HAMILTON: Judge, I can't recall off the top of
12 my head right now whether that was something that was written
13 after the arrest.

14 THE COURT: It's got a -- mark in it.

15 MS. HAMILTON: Right, right, but was it something
16 that Mr. Dean wrote after his arrest by Officer Fiorito?

17 THE COURT: Well, I would think so because the case
18 wasn't filed until after this one. It's 09 C 4374, and the
19 appeal is presumably after that.

20 MS. HAMILTON: Well, Judge, my response to that would
21 just be -- I mean, I think that, you know, depression doesn't
22 have to always be caused by one thing, and a layperson
23 submitting documents to the Court in that situation, I mean --

24 THE COURT: That's a weight issue. It's relevant,
25 okay. So here's what I'm going to permit you to do.

1 MS. HAMILTON: Okay.

2 THE COURT: What I'm going to permit the defendant to
3 do is you -- at least without Mr. Dean in some way opening the
4 door to it, you cannot bring up the fact that there was a
5 lawsuit against Draper and Kramer because I think that is
6 unfairly prejudicial, and it's going to get us all down the
7 road into figuring out what that lawsuit is about.

8 You can bring up -- you can elicit that he has
9 claimed that his clinical depression was a result of what
10 Draper and Kramer did to him in connection with his
11 employment. You can bring up that he has said that in
12 writing. You can't bring up that he said that in a writing
13 that he filed in court because then that gets us into lawsuit
14 territory. And that's the extent of what you can do. Okay.

15 And even if the plaintiff brings this up on the
16 direct examination, you can still do it in cross because
17 you're not limited by the direct. And if you think that
18 Mr. Dean says something either on the direct or on your cross
19 that should broaden the scope of what you can get into, you
20 will ask for a sidebar and I will address it.

21 MS. ATKINS: Your Honor, just for point of
22 clarification, as to his depression, clinical depression,
23 being the result of his treatment from Draper and Kramer or
24 former employer, however --

25 THE COURT: You can say Draper and Kramer. I don't

1 care.

2 MS. ATKINS: May I refer to the racial discrimination
3 as the treatment, not mentioning the claims in the lawsuit?
4 But he specifically alleged both with the EEOC and this Court
5 that it was racial discrimination.

6 THE COURT: So you're asking me can you bring up,
7 isn't it a fact, Mr. Dean, that you have claimed that you were
8 clinically depressed as a result of race discrimination by
9 Draper and Kramer?

10 MS. ATKINS: Yes, race discrimination and your
11 termination from Draper and Kramer. He said he was terminated
12 because of his race.

13 MS. HAMILTON: I would object to that, Judge. I
14 think that your reasoning for allowing in the fact that he
15 said he has clinical depression is --

16 THE COURT: What does the race discrimination aspect
17 add to it that's pertinent?

18 MS. ATKINS: Well, your Honor, if he's alleging
19 racial animus or racial discrimination on the part of Officer
20 Fiorito --

21 MS. HAMILTON: That's propensity.

22 THE COURT: Let her finish the sentence.

23 MS. HAMILTON: All right.

24 MS. ATKINS: It's more of Mr. Dean's state of mind as
25 to how he is consistently treated by others.

1 THE COURT: That's propensity evidence.

2 MS. ATKINS: Yes.

3 MS. HAMILTON: I'm sorry.

4 THE COURT: Next time just let people walk into it,
5 you know, okay. That's inadmissible.

6 Number 7, dismissed claims. So I take it this is
7 only going to -- the thing about dismissed claims is only
8 going to come up, I take it, if I let in the other act
9 evidence? Am I right?

10 MS. ATKINS: I think it would just be Lopez.

11 THE COURT: Yes, okay. So we'll worry about that
12 once I rule on Lopez. Somebody just needs to remind me.

13 MS. ATKINS: The motion also has to do with prior
14 claims that plaintiff brought.

15 THE COURT: You're not going to bring up claims that
16 he brought against Fiorito and the City and dropped, are you?
17 Mr. Kowalczyk. Look at him.

18 MS. ATKINS: No.

19 THE COURT: No, okay, fine. All right.

20 MS. ATKINS: I just got confused for a second.

21 THE COURT: Number 8, background checks. I'm told in
22 the response that you're not going to do them.

23 You're not going to do the ones that lawyers for
24 police officers have done in a number of other cases that
25 involve use of the CLEAR, all capitals, database?

1 MS. ATKINS: Not the CLEAR system, not LEADS, but if
2 there's Westlaw or --

3 THE COURT: You're talking about doing normal sort of
4 Internet searches.

5 MS. ATKINS: Exactly.

6 THE COURT: You don't have a problem with that
7 because you can do those, too.

8 MS. HAMILTON: No, Judge. I just don't want them to
9 use --

10 THE COURT: You're telling me you're not going to use
11 CLEAR and LEADS and so --

12 MS. ATKINS: Absolutely.

13 THE COURT: -- I'm taking your word for that. So I'm
14 denying that motion based on that representation.

15 Number 9, ability to pay punitive damages, and the
16 defendant is saying we're not offering that. And that ties in
17 with the issue about indemnification. And so, you know, if
18 you think that the defense has done something that brings that
19 into play, you will let me know.

20 Okay. So I've dealt with all the motions in limine,
21 I believe, except for the ones that I have tabled.

22 MS. HAMILTON: Yes, Judge.

23 THE COURT: And so you have in mind what it is you
24 have got to get me.

25 MS. HAMILTON: Yes, Judge.

1 THE COURT: I don't have it in my mind right now, but
2 I know that there's more. We have got to do some more talking
3 about the other act evidence once you have gotten me the
4 police reports and the depositions of the two people plus Mr. Dean's
5 police reports.

6 And I want to say there was one other thing. Oh, you
7 were going to give me some law on whether --

8 MS. HAMILTON: Proximate cause.

9 THE COURT: Yes, law on whether lost opportunities as
10 a result of the lawsuit that he filed as a result of the
11 alleged wrongful conduct is recoverable.

12 So if you have got anything on that, get it to me by
13 Friday sometime.

14 MS. HAMILTON: Okay, sure.

15 THE COURT: And the other stuff you're going to get
16 to me -- the depositions and the police reports, you're going
17 to get me first thing in the morning.

18 MS. HAMILTON: Yes, Judge.

19 MR. KOWALCZYK: Yes, your Honor.

20 My clerk, she's going to get it to you. We'll have
21 it for you tomorrow.

22 THE COURT: Good.

23 MS. HAMILTON: Judge, just really quickly. There's
24 objections on the witness and exhibit lists that we need to
25 deal with still, and there is an issue where we need some

1 clarification on whether Officer Fiorito is going to be taking
2 the Fifth at trial, which we still don't know.

3 THE COURT: Is he?

4 MR. KOWALCZYK: It's my understanding that he is not,
5 Judge.

6 THE COURT: Okay. All right, so let's do this. I
7 can't do anything more with you today.

8 MS. HAMILTON: That's fine.

9 THE COURT: You're going to have to come back
10 tomorrow. I can't do it on Friday because I've got other
11 things that I kind of booked in for Friday, and I'm going to
12 have to sort of squeeze you in into a particular slot
13 tomorrow. So let me tell you what that is.

14 MS. HAMILTON: Okay.

15 THE COURT: It's not pretty.

16 (Brief interruption.)

17 THE COURT: So what we need to talk about, you're
18 saying, are objections to witnesses that aren't tied up with
19 the motions in limine that I have carried over.

20 MS. HAMILTON: Yes.

21 THE COURT: And then --

22 MS. HAMILTON: There's exhibits that need to be ruled
23 on, too. We have a disputed exhibit book for you, too.

24 THE COURT: Okay, give me that.

25 MS. HAMILTON: Judge, it's all in the pretrial order,

1 all of our objections and whatnot.

2 THE COURT: Give me that and then come in at 10:30.

3 MS. HAMILTON: I think the defendants have their own
4 exhibits.

5 THE COURT: Yes, and I'm just going to tell you the
6 odds of me ruling before trial on all of this stuff is
7 relatively slim. I may rule on some of it, but I'm probably
8 not going to rule on all of it before trial.

9 MS. HAMILTON: Okay.

10 THE COURT: So who wants to put in the "gentlemen,
11 this is vodka" sign?

12 MS. ATKINS: That would be plaintiff.

13 MS. HAMILTON: That's just a picture of the scene
14 where the car was.

15 THE COURT: Okay. You're not putting it in for the
16 sign, okay.

17 MS. HAMILTON: The point isn't the sign.

18 THE COURT: I mean, I don't know.

19 Okay. So you have got copies of your disputed
20 exhibits?

21 MS. ATKINS: Yes, your Honor.

22 THE COURT: I'm telling you, it's the only two things
23 that are going to be on the agenda for tomorrow.

24 MS. HAMILTON: 10:30, right?

25 THE COURT: 10:30, and I will tell you more tomorrow

1 about other stuff regarding logistics and whatnot.

2 Okay, see you tomorrow.

3 MS. ATKINS: Thank you, your Honor.

4 MS. HAMILTON: Thank you, your Honor.

5 (Which were all the proceedings had in the above-entitled
6 cause on the day and date aforesaid.)

7 C E R T I F I C A T E

8
9 I hereby certify that the foregoing is a true and
10 correct transcript of the above-entitled matter.

11

12

13 /s/ *Laura M. Brennan*

August 17, 2012

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16 _____
Laura M. Brennan
Official Court Reporter
Northern District of Illinois

Date

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